March 4, 2010

By Email (neap_procedures@nigc.gov)
By First Class Mail

Brad Mehaffy
National Indian Gaming Commission
1441 L Street, NW., Suite 9100
Washington, DC 20005

Re: Comments to NIGC Draft NEPA Procedures Manual

Dear Mr. Mehaffey,

I hereby submit comments on behalf of our clients with respect to the National Indian Gaming Commission's (NIGC) draft National Environmental Policy Act Procedures Manual (the "Manual").[1]

The Manual is a welcome development in an area of regulatory review that is notoriously expensive, time-consuming, and subject to uncertainty. The NIGC is to be commended on its effort to clarify its policies and procedures with respect to the implementation of the National Environmental Policy Act (NEPA). We believe that the Manual, when finalized, will indeed reduce the costs and uncertainty associated with NEPA reviews by making clear the roles and responsibilities of participants and by establishing a framework for the preparation, review, and assessment of NEPA-related documents such as an environmental assessment (EA) or environmental impact statement (EIS).

We wish to bring your attention to several concerns, however.

Definition of "Controversial"

As of December 4, 2009, the NIGC had identified only one type of major federal action that it undertakes that warrants review under NEPA, namely, the approval of third-party management contracts for the operation of gaming activity under IGRA, 25 U.S.C. 2711, and the NIGC's implementing regulations, 25 C.F.R. Part 533.[2] The Manual goes on to describe those circumstances in which the NIGC will require preparation of an environmental assessment (Ch. 4), an environmental impact statement (Ch. 5), and when it will grant a categorical exception from NEPA review (Ch. 3).

[1] *See* 75 Fed. Reg. 3756 (Jan. 22, 2010), 74 Fed. Reg. 63765 (Dec. 4, 2009).
[2] 74 Fed. Reg. at 63766.

(202) 543-5000 P
(202) 543-7716 F
503 C Street, NE
Washington, DC 20002
www.andersontuell.com

Chapter 3 of the Manual describes, among other things, the circumstances under which a categorical exception may be issued. Section 3.4 describes extraordinary circumstances which, if found to exist, prevent an otherwise eligible action from being categorically excluded. If the proposed action has one or more of the enumerated conditions, it may not be categorically excluded. The circumstances preventing categorical exclusion include a reasonable likelihood that "the proposed action/project will have effects that are likely to be highly controversial on environmental grounds"[3] or that involve risks that are, among other things, "scientifically controversial."[4] This may be an unnecessarily open invitation to third parties to delay the NEPA process.

The Manual defines "controversial" as meaning when "a substantial dispute" exists over the size, nature, or effect of a proposed action. The effects of a proposed action will be considered "highly controversial" when a "reasonable disagreement" exists over project's risk of causing environmental effects. We believe that "substantial dispute," particularly with respect to the "size" and "nature" of a proposed action, does not provide a workable standard, and is instead susceptible to inconsistent application and raises the potential for abuse. Similarly, the workability of "reasonable disagreement" with respect to the effects on the environment of a proposed action is significantly undercut to the extent the Manual implies that a "substantial dispute" is a question of quantity over quality:

> "Opposition of this nature from Federal, tribal, State, or local agencies/organizations or *by a substantial number of persons affected* by the proposed action should be considered in determining whether or not a reasonable disagreement exists."[5]

While the Manual indicates that the approval of a management contract may theoretically be categorically excluded from NEPA review, in practical terms the inclusion of the "controversy" standard in the Manual effectively precludes the availability of categorical exclusions by the NIGC. Given the historical reality of organized opposition to Indian gaming of any kind, it seems unlikely that the approval of any management contract would ever be from controversy.[6] The NIGC's definition of "controversial" only opens the NEPA process to third parties in a way that goes beyond the requirements of NEPA or CEQA. At the very least it leaves it in the hands of effectively organized opposition to particular gaming projects.

---

[3] Manual, § 3.4.10.
[4] Manual, § 3.4.2.
[5] Manual, § 1.8.2 (emphasis supplied).
[6] The NIGC has identified only one type of major federal action it undertakes that requires review under NEPA: approving third-party management contracts for the operation of gaming activity under IGRA, 25 U.S.C. 2711, and the NIGC's implementing regulations, 25 C.F.R. Part 533. Manual, § 1.9.

Cultural Resources Protection

The Manual indicates that it is the NIGC's policy "to consult and coordinate with, and consider the policies and procedures of other Federal, tribal,[7] State and local organizations/departments/agencies."[8] The Manual would require the NIGC to consult with other Federal, Tribal, State and local agencies and organizations "early and often in the NEPA process."[9] Consultation and coordination with other federal agencies is also required where resources that may be affected by the proposed undertaking are subject to protection by special purpose laws or administrative directives. The Manual gives as one example of a special purpose law Section 106 of the National Historic Preservation Act (NHPA).[10]

The NIGC's obligation to coordinate and consult with other agencies, particularly in the context of cultural and historical resources as protected by laws like NHPA, is especially urgent when the EA or EIS that is being prepared will also be relied on by the Bureau of Indian Affairs (BIA) in connection with a separate but related undertaking such as a land-into-trust application or a request for a lease approval. Where the same NEPA review process is intended to serve multiple federal undertakings, problems may arise if the NIGC is forced to step down as lead agency because of the withdrawal of a management contract from consideration, problems the draft Manual does not address.

The environmental effects to be considered in the NEPA review of a federal undertaking include those upon cultural and historical resources in which other tribes may have protected interests. This will often be the case in regions with rich tribal heritages and histories of relocation and dislocation. In these circumstances it is to be expected as a matter of course that outside tribes may seek to consult in the NEPA process, and may seek consulting party status under Section 106 of the NHPA from the NIGC as lead agency. Once granted, significant collaborative work on cultural and historical issues is likely to be undertaken in the course of preparing the EA or EIS. That work, along with tribes' consulting status, may be lost if the NIGC withdraws as lead agency.

When the NIGC withdraws as lead agency in the context of parallel agency undertakings, the NEPA documentation that has already been prepared generally remains available to a successor lead agency. This in part is due to the reality that the tribe requesting the undertaking generally hires the consultants who prepare the environmental research. Consequently, when a cooperating agency takes over as lead agency, the process of preparing an EA or EIS does not have to begin anew.[11]

---

[7] Please note that the Manual's capitalization of the term "tribal" is inconsistent. *See, e.g.*, § 2.12. The term should be capitalized throughout the Manual.

[8] Manual, § 1.5.6.

[9] Manual, § 2.12. *See also* §§ 4.9.1 (EA Process); 4.9.8 (coordination of EA review); 4.10.10.2 (requirement to document coordination and consultation efforts); 4.11.2.4 (requiring FONSI to reflect compliance with applicable laws, including interagency and intergovernmental coordination and consultation); 5.9.1 (same for EIS);

[10] *See, e.g.*, Manual, § 4.9.8.

[11] *See, e.g.*, 73 Fed. Reg. 57646 (Oct. 3, 2008) (Notice of intent to continue preparing EIS where BIA takes over as lead agency from NIGC).

But the same cannot be said for third-party tribes who were consulting parties with respect to the effects of the NIGC undertaking on cultural and historical resources. Where a tribe has been granted NHPA Section 106 consulting party status, its record of application and consultation will not be available to a new lead agency. That is because the NIGC destroys files prepared in connection with the NEPA review of a management contract within 90 days of the end of the month in which the management contract is withdrawn.[12] This means that the status of tribes participating in the review of effects of an undertaking on cultural and historical resources is nullified. It also means that any research, analysis, or related materials already prepared by the NIGC is lost forever. Tribes that had once been participants in the NEPA process must seek participation again from a new lead agency without the benefit of an already established record. This is particularly unjust where the area of potential effect and the potentially affected environmental, cultural, and historical resources are the same as before.

In order therefore to fulfill its stated policy of consulting with tribes and ensuring the coordination of NEPA reviews with relevant special purpose laws, the NIGC should add provisions to the Manual that address this concern. Specifically, NEPA materials relating to resources protected by special purpose laws or administrative directives such as Section 106 of NHPA that are prepared by the NIGC in connection with a management contract that is withdrawn should, at the minimum, be retained for as long as records for management contracts that are denied, namely six years.[13]

The NIGC should also ensure that files pertaining to any status obtained in connection with special purpose laws or administrative directives during the NEPA review process will be made available to succeeding lead agencies in connection with a parallel federal undertaking as described above. This will eliminate the need for third party tribes to seek permission yet again to consult on the impact of a proposed undertaking on identical cultural and historical resources. It will lessen the possibility of inconsistent eligibility determinations.

Finally, the Manual would benefit from the establishment of guidelines for the provision of notice to consulting and other interested parties in the event the NIGC withdraws as lead agency. The addition of a notice provision could also ensure that a change in lead agencies does not result in the advertent attrition of consulting parties.

Sincerely,

Loretta A. Tuell, Esq.
AndersonTuell, LLP

[12] *See* National Archives and Records Administration, NIGC Request for Records Disposition Authority (Feb. 11, 1997), Item 25(c) (NEPA documents associated with withdrawn contracts or requests for Federal action to be destroyed three months after end of month in which contract or request is withdrawn). By contrast, the NIGC retains the documentation for disapproved management contracts or decisions not to complete planned federal actions for six years before destroying them. *See* 25(b).

[13] *Id.*, Item 25(b).